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NO. 84-522

in the Supreme Court of the United States

OCTOBER TERM, 1984

VICTOR DANTE and EDWARD LEVINE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRIMINAL INDICTMENT NO. CR83-155A

UNITED STATES OF AMERICA

v.

VICTOR DANTE
and EDWARD LEVINE

MEMORANDUM OPINION

Each defendant in the above-styled matter has filed a motion to dismiss based upon the defendant's right not to be placed in double jeopardy. On Monday, November 27, 1983, the United States of America and the defendants appeared before the Court for a jury trial in the above-captioned case. Prior to the selection of the jury, counsel for defendant Dante moved the Court for a motion in limine, based on discovery material counsel had received prior to trial. Defendant moved the Court to forbid the Government from making any mention of the term "organized crime" before the jury.

Assistant United States Attorney James Deichert responded to the defendant's motion stating that he "did not intend to open anything on organized crime." In response to this statement, the defendant requested that any statement concerning "organized crime", whether from a Government witness or attorney, be considered outside the presence of the jury so that the Court could

determine its prejudicial effect in relation to its probative value.

The Court then instructed Mr. Deichert as follows:

> Then let's leave it that way. You won't bring it up in the presence of the jury without again calling it to the attention of the Court and giving all of us an opportunity to discuss it outside the presence of the jury.

Thereafter voir dire was commenced and the jury was selected and sworn.

The Government in its opening statement to the jury made the following statements:

> Borriello will tell you that the reason he went to Salerno and Savino was because he was aware that they had connections with organized crime families, and he sought to come under their [*sic*] protection of the organized crime figures that they were associated with in an effort to intercede with Mr. Dante, to stop him from creating any more violence.
>
> You will hear testimony that Salerno and Savino contacted Mr. Dante and they offered to resolve this debt. Indicated that Borriello was under their protection and offered to have Dante attend what's called a sit down or a negotiation at a table, which is [*sic*] common organized crime terms, in an effort to resolve this debt without any more violence or bloodshed.

* * *

> You will also hear discussion that Salerno and Savino had with Dante in which they referred to a customer [*sic*], or a code in organized crime circles in which if you beat a person the debt is canceled, and much like in the "Merchant of Venice" a pound of flesh but you can't take any blood. So they told him the beating just cost you $100,000. Dante was adamant that the loan was still outstanding, nothing was resolved.

After the Government had completed its opening statement, counsel for each of the defendants made their opening statements to the jury. At the conclusion of all of the opening statements, counsel for the defendants moved for a dismissal and mistrial based upon the Government's references in its opening statement to organized crime in violation of the instructions and understanding described above. The Court denied the motion for dismissal but granted the defendants' motion for mistrial.

The above-styled matter was reset for trial on Monday, January 10, 1984. Prior to jury selection, the Court conducted a hearing on the defendants' motions to dismiss based on governmental misconduct in failing to furnish Jencks material in accordance with a previous commitment. This motion was discussed and denied by the Court for the reasons set forth in the transcript of said hearing.

The Court also conducted a hearing on the issues raised by the defendants' motions to dismiss based

upon defendants' right not to be placed in double jeopardy. Said motions were orally denied and this memorandum opinion is for the purpose of setting forth the Court's reasons for said denial.

The defendants' failure to object at the time of the first instance of the Government's violation has, in the Court's opinion, mitigated to a certain extent the Government's violation. Had the defendants obected at the first opportunity when the first violation occurred, the infraction would not have been so serious and in the Court's opinion, the infraction could have been cured by a proper instruction to the jury provided the subject was not again broached in the hearing of the jury. Secondly, although the Court has expressed on several occasions its inability to understand why the Government's counsel did what he did, the Court is convinced that it was not the intention of the Government's counsel to cause or provoke a mistrial.

All of the Government's references to organized crime referred to Government's witnesses and there were no direct references to either of the defendants as members of organized crime. If counsel for the Government had not so readily conceded violating the Court's order, it is arguable that the Court might have found no violation.

The Government received no significant advantage by reason of the mistrial, but on the contrary, when all of the tactical and practical aspects of the delay are evaluated, it seems to the Court that the delay will work on balance to the defendants' advantage and to the Government's disadvantage. This is especially true when the attitude and willingness of the Government's

witness, Borriello, to testify is evaluated; when his physical and mental conditions are taken into consideration; and when the other aspects of the Government's case as revealed in the opening statement are taken into consideration along with the additional opportunity to prepare a defense which will inure to the benefit of the defendants. The additional opportunity for investigation which inures to the benefit of the Government by reason of the delay seems to be insignificant when compared to the benefits which will accrue to the defendants. Therefore, the Court has concluded that the defendants have failed to establish that the Government intended or wanted a mistrial and for this reason alone under the principles and standards set forth in *Oregon v. Kennedy*, 456 U.S. 667 (1982), the defendants' motion must be denied.

The Court has also considered the right of the defendants to appeal this decision and has come to the conclusion that although defense counsel and defendants are making said motion primarily for the purpose of delay, the Court cannot find and does not conclude that an appeal would be frivolous. Therefore, the trial in this matter is stayed and deferred pending a decision by the United States Court of Appeals for the Eleventh Circuit on the issues raised in the defendants' appeal of the Court's ruling on the double jeopardy assertion.

SO ORDERED, this 12 day of January, 1984.

G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT